

UNIVERSITY OF TECHNOLOGY, SYDNEY

HOW LAWYERS NEGOTIATE

A DISSERTATION SUBMITTED TO

THE FACULTY OF LAW

IN CANDIDACY FOR THE DEGREE OF DOCTOR OF JURIDICAL SCIENCE

by

Rosemary Jessamyn Howell

New South Wales

June, 2005

CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

A handwritten signature in dark ink, consisting of a stylized first name followed by a surname, written in a cursive script.

Signature of Candidate

ACKNOWLEDGEMENTS

The following people provided support and encouragement in the carrying out of this project and I acknowledge their assistance:

First, my generous, persistent and inspirational husband Alan Limbury, without whom this thesis would not be a completed work of which I can be very proud

and also:

Anne Watson, Business Manager Strategic Action Pty Ltd

Justin Neely, Consulting Document Manager

Associate Professor Thomas Altobelli, University of Western Sydney

Christopher J Roper, AM, Director, The College of Law Alliance

Neville Carter, Managing Director, College of Law

Colin Fong, Lecturer University of New South Wales

Professor Jennifer David, University of Technology, Sydney (as she then was)

Susan Carr-Gregg, Senior Lecturer, University of Technology, Sydney

Lawyers, Clients and Students who generously participated in focus groups.

TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF CONTENTS | iii |
| CHAPTER 1: INTRODUCTION | 1 |
| 1.1 Setting the scene: Negotiation as a key element of lawyers' work..... | 1 |
| 1.2 Thesis objectives | 3 |
| 1.3 A working definition of negotiation..... | 5 |
| 1.4 What is lawyers' work?..... | 10 |
| CHAPTER 2: LITERATURE REVIEW | 15 |
| 2.1 Negotiation theory and practice | 15 |
| 2.1.1 Behavioural, Normative and Prescriptive Analyses..... | 15 |
| 2.1.2 The Three Principal Theories of Negotiation..... | 16 |
| 2.1.2.1 The Distributive Theory | 16 |
| 2.1.2.2 The Cooperative Theory | 17 |
| 2.1.2.3 The Integrative Theory | 17 |
| 2.1.3 Development of the Field of Negotiation | 17 |
| 2.1.3.1 The Social Scientists..... | 18 |
| 2.1.3.2 The Business Schools | 19 |
| 2.1.3.3 The Lawyers | 25 |
| 2.1.4 The Australian Texts..... | 32 |
| 2.2 Lawyers and negotiation | 37 |
| 2.3 Discussion | 45 |
| CHAPTER 3: RESEARCH OBJECTIVES AND METHODOLOGY | 47 |
| 3.1 Research objectives..... | 47 |
| 3.2 Methodology | 49 |
| 3.2.1 Selecting the fields of research | 49 |
| 3.2.2 Objectives of methodology | 50 |
| 3.2.3 Deficiencies in the methodology..... | 50 |
| 3.2.4 Setting research parameters and developing research methodology..... | 52 |
| 3.2.5 Qualitative research..... | 52 |
| 3.2.6 Selecting focus groups and identifying processes..... | 57 |
| CHAPTER 4: WHAT DO LAWYERS BRING TO THE PROCESS OF NEGOTIATION? - SOME OBJECTIVE DATA..... | 62 |

| | | |
|-------|---|-----|
| 4.1 | Introduction | 62 |
| 4.1.1 | Focus group research..... | 67 |
| 4.1.2 | Behavioural analysis | 67 |
| 4.2 | The tools for behavioural analysis | 68 |
| 4.3 | Behavioural analysis: The DISC model..... | 69 |
| 4.3.1 | Background | 69 |
| 4.3.2 | The characteristics of the DISC lawyer model | 72 |
| 4.4 | Behavioural analysis: Myers-Briggs Type Indicator (MBTI)..... | 74 |
| 4.4.1 | The Contribution of Carl Jung | 74 |
| 4.4.2 | The Development of the Myers-Briggs Type Indicator from Jung's Theory of Preferences | 75 |
| 4.4.3 | Building Acceptance - Uses of the MBTI in Law and Order Occupations..... | 76 |
| 4.4.4 | MBTI Results | 79 |
| 4.4.5 | The Four Temperaments Approach | 85 |
| 4.5 | Summary of MBTI results | 88 |
| 4.5.1 | Comparison of undergraduate lawyers with the general population..... | 88 |
| 4.5.2 | Comparison of practising lawyers with the general population..... | 90 |
| 4.5.3 | Comparison with other MBTI research..... | 92 |
| 4.6 | What conclusions may be drawn from the MBTI results?..... | 98 |
| 4.6.1 | Characteristics of undergraduate lawyers and practising lawyers | 98 |
| 4.6.2 | Comparison between the general population, undergraduates and practising lawyers | 98 |
| 4.7 | The 'lawyer type' | 100 |
| | CHAPTER 5: FOCUS GROUP RESEARCH | 102 |
| 5.1 | Introduction | 102 |
| 5.2 | Selecting focus groups | 102 |
| 5.3 | Identifying focus group processes..... | 103 |
| 5.4 | Recording the focus groups..... | 104 |
| 5.5 | Focus group outcomes..... | 106 |
| 5.5.1 | Elements of a good outcome to a negotiation | 106 |
| 5.5.2 | The characteristics of lawyers in negotiation..... | 107 |
| 5.5.3 | Some general comments about focus group outcomes | 125 |
| 5.6 | Other data | 130 |

| | |
|--|-----|
| CHAPTER 6: THE TRAINING OF LAWYERS IN NEGOTIATION | 132 |
| 6.1 Introduction | 132 |
| 6.2 The recent history of the legal education debate..... | 133 |
| 6.3 Core Subjects | 138 |
| 6.4 Electives | 141 |
| 6.5 Practical legal training..... | 141 |
| 6.6 Other issues | 144 |
| 6.7 Other training | 145 |
| 6.8 General conclusions on current training | 147 |
| 6.9 The possible direction of future training | 149 |
| CHAPTER 7: CONCLUSIONS | 156 |
| 7.1 Introduction | 156 |
| 7.2 Conclusions | 158 |
| 7.2.1 There is no clear relationship between negotiation theory and how lawyers negotiate..... | 158 |
| 7.2.2 Those for whom and with whom lawyers negotiate want better experiences from the process of negotiation and communication | 159 |
| 7.2.3 Although the behavioural preferences of lawyers contribute to their success in 'lawyering', they also contribute to their problems with relationships and communication, not only with their clients but with suppliers and their own staff. | 160 |
| 7.2.4 Training regimes are presently inadequate | 160 |
| 7.2.5 Regulators and other providers have a significant interest in how lawyers negotiate and communicate | 162 |
| 7.2.6 The goal..... | 162 |
| APPENDICES | 164 |
| APPENDIX 1. Focus Group Summaries | 164 |
| Focus Group 1 - Post Graduate Negotiation Students: Non-Lawyers (No. 1). 164 | |
| Focus Group 2 - Postgraduate Negotiation Students: Non-Lawyers (No. 2). 169 | |
| Focus Group 3 - Commercial Clients Post Mortem..... | 174 |
| Focus Group 4 - Year 11 Legal Studies Students | 180 |
| Focus Group 5 - Law Firm Staff: Secretaries and Other Support Staff..... | 186 |
| Focus Group 6 - Managers: 4-10 Partner Law Firms..... | 189 |

| | |
|--|-----|
| Focus Group 7 - Suppliers of Services to Law Firms (No. 1): Consultants in Training and Human Resources..... | 193 |
| Focus Group 8 - Suppliers of Services to Lawyers (No. 2): IT Suppliers (Debrief of a Tender Process)..... | 197 |
| Focus Group 9 - Service Managers: 20+ Partner Law Firm | 201 |
| Focus Group 10 - Partners: Medium-Sized Accounting Practice | 206 |
| Focus Group 11 - Undergraduate Law Students | 210 |
| Focus Group 12 - Senior Management Teams: NSW State Government Department..... | 215 |
| Focus Group 13 - Statutory Authority: Business Unit Managers | 218 |
| Focus Group 14 - Medium-Sized Law Firm: Debrief With Small Business Client..... | 222 |
| Focus Group 15 - Corporate Client: Claims Managers, Insurance Company. | 225 |
| Focus Group 16 - Law Firm Marketing Managers | 229 |
| Focus Group 17 - Corporate Client: Senior Executive Team, Manufacturing Industry | 234 |
| Focus Group 18 - Corporate Lawyers (No. 1) | 237 |
| Focus Group 19 - Corporate Lawyers (No. 2) | 241 |
| Focus Group 20 - Corporate Executives: Treasury Group, Financial Services Group Of Companies..... | 245 |
| Focus Group 21 - Real Estate Agent: Western Suburbs Sydney | 249 |
| Focus Group 22 - Managing Partners: Medium-Sized Law Firms | 254 |
| Focus Group 23 - Corporate Lawyers (No. 3) | 259 |
| Focus Group 24 - Postgraduate Negotiation Students: Non-Lawyers (No. 3) .. | 263 |
| APPENDIX 2. Core Subjects offered by all Australian Law Schools as at 31 May 1999 | 268 |
| APPENDIX 3. Availability of Negotiation Training in Australian Law Schools as at 31 May 1999 | 275 |
| APPENDIX 4. Deborah Tannen - Case Study..... | 278 |
| APPENDIX 5. Biographical Notes - Rosemary Howell | 280 |
| APPENDIX 6. How Professionals Learn | 284 |
| APPENDIX 7. 1999 Study – Satisfaction With Lawyers: Summary of Findings & 2003 Study – Australian Insurance Lawyers: Precis of | |

| | |
|--|-----|
| Findings | |
| Julian Midwinter & Associates Pty Ltd | 286 |
| BIBLIOGRAPHY | 290 |
| 1. Books, reports and conference papers..... | 290 |
| 2. Articles | 297 |
| 3. The following Publications, although not cited, were consulted as part of the broad field of study undertaken for this thesis: | 302 |
| 3.1 Books, reports and conference papers..... | 302 |
| 3.2 Articles | 306 |

ABSTRACT

Negotiation literature identifies three principal theories of negotiation confusingly complicated by the wide variety of names that have been applied to them.

The distributive theory (also called *value-claiming*, *competitive*, *adversarial* and *hard bargaining*) regards all gains as made at the other party's expense.

The *cooperative* theory (also known as *coordinative* and *soft bargaining*) regards concessions as a way to capitalize on the opponent's desire for a fair outcome.

The *integrative* theory (also known as *value-creating*, *problem-solving*, *win-win* and *principled negotiation*) involves joint attempts to reconcile the parties' interests so as to benefit both.

Despite the vast amount of literature on negotiation theory, none of these theories is lawyer-specific. Only Williams and Schneider have (separately) undertaken empirical research in an attempt to demonstrate how lawyers negotiate, as perceived by other lawyers (peer review). Their research found that in 60% of the cases they surveyed, US lawyers perceived other US lawyers as behaving consistently with cooperative negotiation theory.

These studies do not permit conclusions to be drawn as to how a different cohort, namely clients and other non-lawyers, evaluate their experiences with lawyers in negotiation because the perceptions of clients may differ from the perceptions of lawyers.

This review of the literature and the demonstrated lack of relevant data confirm the important contribution that can be made to our understanding of how lawyers negotiate by collecting valid, independent, objective data to identify the role of negotiation in lawyers' work, the experiences of clients and other non-lawyers engaged in negotiation with lawyers and their levels of satisfaction or dissatisfaction with the process and its outcomes.

The original research conducted for this thesis therefore studied how those with whom and for whom lawyers negotiate evaluate lawyers in negotiation.

The results indicate that clients and other non-lawyers perceive NSW lawyers' negotiation behaviour as more consistent with the competitive theory of negotiation than with other theories.

The behavioural profiles of lawyers, ascertained through MBTI and DISC analysis, were compared with those of the general population, showing that lawyers have a distinct behavioural profile which may be used to explain how their behaviour is likely to be perceived by others. In apparent contradiction of the findings of Williams and Schneider, the MBTI research revealed a competitive, task focused pattern of behaviour inconsistent with building effective working relationships.

Focus groups comprising clients, staff and lawyers in management and general counsel roles were asked to identify the characteristics of lawyers in negotiation. The results were consistent with the MBTI and DISC research results and enabled ten characteristics of lawyers in negotiation to be identified. These focus group outcomes showed lawyers to be committed to achieving good outcomes for their clients but to be engaged in a range of behaviour which their non-lawyer constituency perceived as impeding good outcomes.

A study of the training regime for student lawyers indicates that undergraduate training regimes are inadequate and do not provide law students with opportunities to develop an understanding of negotiation theory and practice and to enhance their skills.

It is concluded that lawyers and clients may have different perceptions of lawyers' negotiation behaviour; that there is no clear relationship between negotiation theory and how lawyers negotiate; and that experience of the cohort with and for whom lawyers negotiate may be more readily explained by behavioural theory than by negotiation theory.